Aduke & 2 others v Republic (Criminal Appeal E059 of 2023)
[2024] KEHC 6429 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6429 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E059 OF 2023

RE ABURILI, J

MAY 30, 2024

BETWEEN

LAVENDER AKOTH ADUKE ..... 1ST APPELLANT

MILLICENT AKINYI AWANDO ..... 2ND APPELLANT

LILLIAN ACHIENG OWINO ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment, conviction and sentence by the Hon. B. Omollo on the 28.9.2023 in the Chief Magistrate's Court in Kisumu in Criminal Case No. 78 of 2019)

JUDGMENT

Introduction

1. The appellants herein were jointly charged with the offences of stealing by servant contrary to section 268 (1) of the Penal Code, Conspiracy to defraud contrary to section 317 of the Penal Code and also making false documents contrary to section 357 (a) of the Penal Code.

2. The particulars of the charges brought against the appellants were that on diverse dates between the 1st January 2016 to the 21st January 2019 at Gulflab Chemical Company Ltd Kisumu Branch in Kisumu County jointly with others not before court, being employees of the said company stole Kshs. 16,153,738.29 which came into their possession by virtue of being employees of the said company, that they jointly conspired to defraud the said company with other not before court and with the intent to defraud the said company by making without lawful authority modified daily sales receipts purporting that the said documents were made by the said company.

3. The appellants pleaded not guilty to the charges and the matter proceed to trial with the prosecution calling 10 witnesses in proof of their case. It was the trial court's holding that the defense offered up

by the appellants amounted to mere denials and did not hold any water. The trial magistrate convicted the appellants on all three charges brought forth against them.

4. On sentencing, the trial court considered the mitigation put forth by the appellants as well as the pre-sentencing report in respect to the accused persons and proceeded to sentence the appellant to 5 years' imprisonment and further directed each of them to pay Kshs. 5,384,379.43 on the first charge of stealing by servant. On count 2 of conspiracy to defraud, the appellants were sentenced to pay a fine of Kshs. 200,000 or in default serve 2 years' imprisonment. On the 3rd count of making false documents the appellants were sentenced to pay a fine of Kshs. 2,000,000 each or in default serve two years' imprisonment.

5. Aggrieved by the trial court's finding, the appellants filed separate appeals being Criminal Appeal E059 OF 2023, E061 of 2023 and E056 of 2023 that were consolidated.

6. The gravamen of the appellant's appeals in their respective petitions are summarised as follows;

    1. The learned trial magistrate erred both in law and fact in failing to appreciate that the prosecution failed to prove their case beyond reasonable doubt and in essence shifting the burden of proof to the appellants.

    2. The learned trial magistrate failed to consider the several material contradictions in the prosecution case that raised a reasonable doubt that she ought to have resolved in favour of the appellants.

    3. That the learned trial magistrate erred in law and in fact by proceeding to convict the appellants on both the charge of conspiracy and that of theft when both related to the same transaction.

    4. That the charge in count 3 as set out in the charge sheet was incomplete and hence defective as it was drawn in relation to "daily sales receipts" and hence compound and defective.

    5. The trial magistrate erred both in law and fact in applying wrong principles in sentencing and taking into account relevant material factors in sentencing the appellants.

7. The parties herein filed submissions to canvass the appeal.

The Appellants' Submissions

8. It was submitted that the prosecution failed to produce any stock record for the amount alleged to have been stolen of Kshs. 16,153,738.29 and that failure to produce any stock record inferred that the trial court assumed without any basis that the complainant had stock worth the amount alleged. Reliance was placed on the case of Alice Wanjiku Ng'ang'a v R [2006] eKLR where the court in a similar matter held interalia that without evidence, documents and demonstration of the existence of alleged stolen goods, the prosecution evidence remained mere allegation without cogent proof and could not sustained a conviction.

9. The 1st appellant submitted that the complaint brought forth against her was against theft of cash sales yet unlike her co-accused, she never dealt with cash sales but only corporate clients.

10. The 1st appellant further submitted that she was not involved in the audit process and as such did not have a chance to explain herself about the issues arising in the said report as was held in the case of R v Paul Odiwuor Onyango [2019] eKLR where the court held interalia that failure by an auditor

to interview the respondent created several gaps in the prosecution's case which created doubt as to whether the respondent stole the money as charged and thus the prosecution failed to prove their case.

11. It was submitted that from the evidence adduced, the prosecution failed to charge the main suspect, PW3, but instead used the appellants as scape goats. It was further submitted that anyone could access the system and tamper with the daily posting save for the 1st appellant as she never dealt with cash transactions which was the basis of the charge on theft.

12. The appellant further submitted that the prosecution failed to produce the primary source of documents that they relied upon and as such the court should have ruled in favour of the appellant as nothing was placed in front of it to support the reports produced as was held in the case of Andrew Kipkurui Bett v R [2017] eKLR.

13. It was further submitted that there was no evidence linking the 1st appellant to a common intention with others to defraud the complainant as the 1st appellant did not deal with cash sales but corporate clients who never purchased over the counter. Reliance was placed in the writing Archibold's Criminal Pleadings, Evidence and Practice 2010 (Sweet & Maxwell) at pages 3025 and 3026 where it is observed interalia that the offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons....so long as a design rests in intention only, it is not indictable; there must be agreement...

14. The 1st respondent further submitted that no evidence was adduced in support of the charge of making false documents.

15. It was submitted that the learned magistrate erred by sentencing the appellants in both count 1 and 2 of the charge sheet whereas count 2 is the preparatory stage of count 1 and thus count 1 is a complete charge encompassing count 2 and the facts used in both are the same and thus the sentencing in both amounts to double punishment for the same offence.

16. It was further submitted that the sentence for the appellants to pay Kshs. 5,384,379.43 each as compensation to the complainant was high and unsubstantiated as there was no evidence that the appellants directly benefited to that amount and further that the prosecution failed to prove its case beyond reasonable doubt.

The Respondents' Submissions

17. It was submitted that the totality of the evidence tendered by the prosecution witnesses proved beyond reasonable doubt that the appellants were employees of the complainant and that they stole Kshs. 16,153,738.29 being the property of the complainant and thus the prosecution satisfied the elements to sustain the charge of stealing by servant as was held by the trial court.

18. On the 2nd Count of conspiracy to defraud it was submitted that all the appellants in their capacities as employees of the complainant company had a common intention which was demonstrated by the edited books to edit sales and make false entries which led to over Kshs. 16,000,000 being unaccounted for.

19. As to whether there was an intention to defraud the complainant company the respondent submitted that the appellants' actions of creating several other user accounts without the consent of PW1, the duplication and modification of the daily sales were all done with the sole intention of defrauding the complainant and thus the prosecution proved its case beyond reasonable doubt.

20. As to whether the prosecution proved the offence of making false documents, it was submitted that the various testimonies of PW1, PW3, PW4 and PW5 as well as the excel tabulations of the seven books

for 2016, 2017 and 2018 and the modified sales summary all proved beyond reasonable doubt all the charges levelled against the appellants.

21. It was submitted that contrary to the appellants' allegations, the trial magistrate considered their defence in which they denied the charges without tendering any tangible evidence or alibi to shake or create doubt in the prosecution case.

22. The respondent further submitted that the sentences passed on the appellants were fair and just in the circumstances and that the court ought not to interfere with the same.

Analysis and Determination

23. This being the first appellate court, I am guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated:

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

24. I have considered the grounds of appeal and the submissions by the appellants and the prosecution counsel. It is my opinion that the issues for determination are:

    i. Whether the charge in Count 3 is defective,

    ii. Whether the prosecution proved their case against the appellants on all 3 counts beyond reasonable doubt and

    iii. Whether the trial magistrate applied the wrong principles and took into account irrelevant factors in sentencing the appellants.

25. As a preliminary issue, I will consider the appellant's pleading that the charge as set out in count 3 against the appellants was incomplete and hence defective.

26. The appellants were charged in Count 3 as follows:

    COUNT III

    MAKING DOCUMENTS CONTRARY TO SECTION 357 (a) OF THE PENAL CODE

    1. LILIAN ACHIENG OWINO 2. LAVENDER AKOTH ADUKE 3. MILLICENT AKINYI AWANDO. On the diverse dated between 1st of January 2016 to 31st December 2018 at GULFLAB CHEMICAL COMPANY LTD jointly with others not before court with intent to defraud without lawful authority modified daily sales receipts purporting it to be made by the said company.

27. In the case of Isaac Omambia v Republic, [1995] eKLR the court considered the ingredients necessary in a charge sheet and stated as follows:

> " In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement

of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

28. The Court of Appeal in Peter Ngure Mwangi v Republic [2014] eKLR, quoted the Isaac Omambia case with approval and further stated that:

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO v R, [198] eKLR that:
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> "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
>
> (ii) when for such reason it does not accord with the evidence given at the trial."

29. The Court of Appeal in the Peter Ngure case was further guided by the case of Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR) where the Court held thus:

> " The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

30. The trial court record reveals that the charge sheet was read out to the appellants in open court and they pleaded not guilty. The appellants pleaded not guilty and proceeded to carry out their defence. The appellants were well aware of the charges brought against them as was evident from the defence they carried out. They never raised the issue of the charges being defective. At page 124 of the physical record of appeal filed, the advocate for the appellants filed written submissions contending that the charges did not disclose any offence charged. No issue as to the defect to the count No. III was raised and I find no such material defect that would render a conviction on that charge or count, fatally defective.

31. In addition, Section 382 of the Criminal Procedure Code provides that:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard

to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

32. Accordingly, it is my finding that the appellants were aware of the charge against them and were able to carry out their defense before the trial court without being prejudiced.

33. As to whether the prosecution proved its case beyond reasonable doubt, I will discuss whether each of the three counts were proved beyond reasonable doubt. Section 281 of Cap 63, under which the appellants were charged provides:

> " If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable imprisonment of seven years."

34. To secure a conviction on the charge of stealing by servant, the prosecution must prove stealing also known as animus furandi or fraudulent conversion. It must also be proven that the stolen items belonged to the employer and that the offenders are clerks or servants. The standard of proof is that beyond reasonable doubt. That standard of proof was discussed in the case Gordon Omondi Ochieng v Republic (2021) eKLR as follows:

> "
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> " 31. And in Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:
> 'Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.'" (emphasis)

35. Stealing is defined in the Black's Law dictionary 8th Edition as:

> " To take (personal property) illegally with the intent to keep it unlawfully".

36. The definition of stealing as found in section 268 of the Penal Code is:

> " A person who fraudulently and without claim of right takes anything capable of being stolen on fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property."

37. The element of the appellants' employment by the complainant, Gulflab Chemical Ltd Kisumu, is undisputed as the same was proven through the production of the appellant's Contracts of Employments as PEx1,2 and 3.

38. Did the prosecution prove that it was the appellants who stole the property of the employer, the complainant herein? The evidence adduced herein shows that the prosecution produced as Exhibits Audit Trail Reports and the Daily Sales Summary Reports which demonstrated the amount of money that got lost over the period of time from 2016, 2017, 2018 and January 2019.

39. PW1 specifically testified that the 1st appellant and 3rd appellant went to his office with computer-generated receipts with similar serial numbers but different values on them which was not normal as one could not have one sale on different transactions. PW4 testified that he advised PW1, the Director of the Complainant Company to implore upon his employees to use the digital method of payments as a stop-gap measure after the discovery of fraud was made in the company.

40. PW5 testified that she would on various occasions witness the appellants open and access the shop earlier than the scheduled time of 8am, access PW1's office and talk about pulling down documents on PW1's computer.

41. The prosecution led evidence that the appellants would wait for other employees at the complainant's company to arrive and they would re-open the shop again to appear as if they had just reported at the same time with other employees of the company.

42. PW6 testified that while doing monthly stock taking at the complainant's shop he would get unexplained stock variances between physical and system stocks. It was his testimony that the 2nd appellant would frequently fail to explain the disparities in stock.

43. PW8 on his part testified that the appellants had been assigned user roles in input, change or modification of a transaction depending on rights and privileges, that the audit trail received was supposed to have a unique transaction number and that in this case there were several items sold in the same transaction number leading to the loss of funds, that the money paid for the items could not be accounted for and the items had been sold at a lesser value than the supposed value.

44. He further testified that the Computer Forensic Examination Report produced as Exhibit No. 15 "a" revealed that the Users indicated under last modified column were responsible for initiating fraudulent transactions.

45. The testimony of PW9 was that when he started the audit exercise of the complainant's company records by looking at the Quick Books, he discovered that there were duplicated sales receipts for the years 2016,2017 and 2018. It was his testimony that the total sum of money which the complainant's company lost was Kshs. 16,163,743.29. PW9 testified that the appellants completely refused to use the company's Till number mode of cashless payment.

46. Juxtaposed against this was the defence offered by the appellants which denied the charges against them.

47. Taking all the above into consideration, I find and hold that the evidence as reevaluated above proved the case against the appellants on this count I beyond reasonable doubt. I find no reason to interfere with the trial magistrate's finding on of the guilt of the accused persons. i uphold the conviction on count I.

48. On Count 2 the charge of, Conspiracy to defraud contrary to section 317 of the Penal Code, the Section provides as follows:

> Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a misdemeanour and is liable to imprisonment for three years.

49. Under that Section, one of the components of the charge of conspiracy to defraud is that the conspiracy must be done with the intent to defraud and therefore it cannot be said to be a double charge.

50. In Black Law Dictionary 9th Edition at page 351 Conspiracy is defined as:

> " An agreement by two or more persons to commit an unlawful act coupled with an intent to achieve the agreements motive, and (in most cases), action or conduct that furthers the agreement; a combination for unlawful purpose.
>
> The agreement may be proved in the usual way or by proving circumstances which the jury may presume it. Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in principle of an apparent criminal purpose in common between them."

51. The question is whether the prosecution adduced evidence that the appellants conspired to steal the sum of Kshs. 16,153,738.29. The prosecution led evidence more so by PW5 that she would on various occasions witness the appellants open and access the shop earlier than the scheduled time of 8am, access PW1's office and talk about pulling down documents on PW1's computer and further that the appellants would wait for other employees at the complainant's company to arrive and they would re-open the shop again to appear as if they had just reported at the same time with other employees of the company.

52. Additionally, PW1 testified that the 1st appellant and 3rd appellant went to his office with computer-generated receipts with similar serial numbers but different values on them which was not normal as one could not have one sale on different transactions. The prosecution showed that on the 2.1.2019, the receipt number 53238 had been edited and used for four different sales by the appellants and that it had different amounts on them. This evidence was not controverted at all.

53. The question is, why would the appellants behave in the manner testified by PW5? There must have been a sinister motive to the appellant's actions. The fact that the receipt number 53238 had been edited and used for four different sales by the appellants and that it had different amounts on them and further that the appellants even presented it before PW1 showed that the appellants had common intention and they did indeed conspire to defraud the complainant company.

54. I thus find the evidence adduced proved this charge beyond reasonable doubt. I uphold the trial court's finding convicting the appellants on this count.

55. Finally, on Count 3, making false documents contrary to section 357 (a) of the Penal Code. The offence of making a document without authority is set out in Section 357(a) as follows:

> " Any person who, with intent to defraud or to deceive:
>
> (a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing."

56. From the definition above, the offence constitutes the following ingredients:

i. proof of the making, signing or execution of a document and that the same was done by the accused,

ii. proof that the making, signing or execution was without lawful authority or excuse and

iii. proof that the making, signing and execution was with the intention to defraud or deceive.

57. The evidence of PW1 was that the 1st and 3rd appellants had access to the sales computer. That the 1st and 2nd appellants herein approached PW1 with receipt number 53238 that had been edited and that the 3rd appellant did multiple sales using that one same receipt. There was no authority to edit the receipt in question. The said receipt was used for four different sales, which is evidence intention to defraud or to deceive the employer. Iam satisfied that the prosecution proved this count III beyond reasonable doubt.

58. The appellants in their petition of appeal alleged that there were several material contradictions in the prosecution's case that raised reasonable doubt as to their guilt. It is my finding that it is not enough to assert that there were contradictions in the prosecution's case, the appellants must lead evidence of the alleged contradictions.

59. From my evaluation of the evidence adduced on record, contrary to the appellant's averments in their petition of appeal and submissions of contradictions and inconsistencies that could not warrant the upholding of a positive judgment, my evaluation of the evidence adduced by the prosecution before the trial court is firstly- I do not see any contradictions and inconsistencies in the prosecution witnesses and secondly, if any, the same are not sufficient to warrant the overturning of the trial court's judgement. This court agrees with the holding in Philip Nzaka Watu v Republic [2016] eKLR that:

> " However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.
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> In DICKSON ELAI NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:
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> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

60. In addition, the Court of Appeal in Richard Munene v Republic [2018] eKLR stated inter alia that:

> " only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

61. Accordingly, it is my finding that there were no contradictions and inconsistencies sufficient to create doubt in the trial court's mind as to the appellant's guilt. This ground also fails.

62. The appellants further relied on this court's decision in Siaya High Court R V Paul Odiwor [2019] to submitted that they were not involved in the audit hence their conviction was not sound. I have read

that decision rendered by myself and the circumstances were not the same as was in this case. I stated as follows in the following paragraphs:

> "In addition, the prosecution did not explain why the auditor did not interview the respondent during the audit yet the respondent was still in the complainant's employment and service during the said audit, to explain any discrepancies or the shortages identified by the auditor.
>
> I am in agreement with the trial court that the respondent should have been interviewed before the audit report was filed and submitted to the police because he was a person of interest and as he was not the overall boss in Siaya, he may have had an explanation to give before the charges were filed against him."

63. In the above case, the audit was done clandestinely whereas in this case, there is evidence from PW1 that the appellants were questioned about the discrepancies upon discovery of the malpractices and suspicious transactions and that they were called upon to explain and upon their failure to explain satisfactorily that the matter was reported to the police and criminal charges preferred against them. In my view, each case must be considered on its own facts and circumstances and not cherry pick one judgment and plant it on another file. The entire judgment and context in which this court made the above finding were totally different.

64. The appellants further contended that the trial magistrate erred in proceeding to convict them on both the charge of conspiracy and that of theft when both related to the same transaction. It is my view that this issue has no bearing on the conviction of an accused person rather the sentence meted out on the convict. I say so because the two offences are totally different and fall under different sections of the law.

65. Section 14 of the Criminal Procedure Code provides as follows:

> (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

66. In Peter Mbugua Kabui v Republic [2016] eKLR the Court of Appeal stated as follows:

> "As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

67. In Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the Court of Appeal for Eastern Africa considered the issue of a consecutive as opposed to a concurrent sentence and expressed the view that it was still good practice to impose concurrent sentences where a person commits more than one offence at the same time and in the same transaction save in very exceptional circumstances.

68. Further Sentencing Policy Guidelines provide as follows:

> "7. 13 – Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the

course of multiple transactions and where there are multiple victims the sentences should run consecutively".

69. The Court of Appeal has defined the phrase 'same transaction rule' in the case of Republic v Saidi Nsabuga S/O Juma & Another [1941] EACA and revisited it again in Nathan v Republic [1965] EA 777 where the court stated as follows:

> " If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."

70. In a scholarly text on principles of sentencing D.A.THOMAS (HAREMANN 2ND EDITION [1979]page 53 articulated the rationale of one transaction rule as follows:

> " The essence of one – transaction rule appears to be that consecutive sentences are in appropriate when all the offences taken together constitute a single invasion of the same legally protected interest. The principle applies where two or more offences arise from the same facts.....but the fact that the two offences are connected simultaneously or close together in time does not necessarily mean that they amount to a single transaction."
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> (See Muthangya Mutembei v Republic [2019] eKLR)

71. Having said all the above, and before I conclude on whether the term or default sentences should be consecutive or concurrent, I now turn to the final issue for consideration which is whether the sentence meted out on the appellants was harsh and excessive.

72. Section 281 of the Penal Code Cap 63 (Laws of Kenya) provides that:

> " If the Offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years."

73. The offence the Appellants were charged in Count 1 carries a maximum sentence of seven (7) years imprisonment. In the circumstances of the case, the sentence of five (5) years imprisonment was lenient. However, the section does not provide for payment of the funds stolen. That being the case, section 31 of the Penal Code comes in handy. The section permits the court to make an order of compensation to the complainant. The section provides that:

> "
>
> " 31. Compensation
> Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment."

TABLE

74. In addition, section 175 of the Criminal Procedure Code provides that:

> " 175. (Orders for compensation and expenses
>
> 1) A court which—

(a) on convicting a person of an offence, imposes a fine, or a sentence of which a fine forms part; or

(b) on appeal, revision or otherwise, confirms such a sentence, may, when passing judgment, order the whole or any part of the fine recovered to be applied in defraying expenses properly incurred in the prosecution of the offence.

(2) A court which—

(a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and

(b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party"), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.

(3) No order shall be made under subsection (2)—

(a) so as to require payment of an amount that exceeds the amount that the court making the order is authorised by law to award or confirm as damages in civil proceedings; or

(b) in any case where, by reason of—

(i) the complexity of evidentiary matters affecting the quantum of damages;

(ii) the insufficiency of evidence before it in relation to such damages or their quantum;

(iii) the provisions of the *Limitation of Actions Act* (Cap. 22); or

(iv) any other circumstances, the court considers that such an order would unduly prejudice the rights of the convicted person in respect of the civil liability.

(4) No order under this section shall take effect—

(a) before the expiry of the time limited for appeal against the conviction or sentence in respect of which the order was made; or

(b) while any such conviction or sentence is the subject of appeal, unless and until the conviction or sentence, and the order, are confirmed by the court determining the appeal.

(5) A court determining an appeal referred to in subsection (4) shall affirm, quash or vary an order under this section, as justice requires.

(6) An order under this section that has taken effect is enforceable in the same manner as a judgment in civil proceedings for the amount awarded by the order.

(7) An award by order under this section in respect of a civil liability is, to the extent of the amount awarded, a defence in any subsequent proceedings instituted in respect of that liability."

75. I thus find that the trial magistrate was not in error when she ordered for compensation of the victim of the offence. I uphold the trial court's sentence in as far as it provides for the 5 years imprisonment and the compensation direction for each of the appellants to pay Kshs. 5,384,379.43 compensation to the complainant.

76. On count 2, the appellants were sentenced to pay a fine of Kshs. 200,000 or in default serve 2 years' imprisonment. Section 317 of the Penal Code provides that persons convicted for the offence of conspiracy to defraud are guilty of misdemeanours and liable to three years' imprisonment.

77. From the record, the court exercised its discretion and fined the appellant an amount of Ksh 200,000, this was under Section 28 of the Penal code. The provision related to fines and like other penal clauses, have default sentences of imprisonment. However, under section 28 of the Penal Code, the default sentence in the instant matter should have been one-year imprisonment and not two years imprisonment.

78. I thus find that the trial court was within the law in sentencing the appellants but the default sentence in count II ought to have been 1 year and not 2 years as imposed. I set aside the two years prison term and substitute it with one year imprisonment in default of payment of the imposed fine.

79. On Count 3, the appellants were sentenced to pay a fine of Kshs. 2,000,000 each or in default serve two years' imprisonment. The maximum sentence for the offence is 7 years. The trial court in my view gave a lenient sentence correct default sentence.

80. Taking all the above into consideration, I conclude that the prosecution proved its case against the appellants beyond reasonable doubt. The conviction of the appellants is upheld.

81. On sentences imposed, the question is whether they should be consecutive or concurrent. I have already cited section 14 of the CPC which provide for consecutive sentences which the trial court imposed.

82. However, on whether the sentences should run consecutively, section 14 of the Criminal Procedure Code provides as follows:

"(1)Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently."

83. .In Peter Mbugua Kabui vs Republic (supra), the Court of Appeal stated as follows:

" As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if

separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

84. I have also considered the Sentencing Policy Guidelines which contain specific provisions on whether a court should impose consecutive or concurrent sentences. The Guidelines provide as follows:

> "Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.
>
> The discretion to impose concurrent or consecutive sentences lies in the court."

85. I note that the offences all the appellants were charged with emanated from the same transaction and therefore the sentences are to run concurrently and not consecutively as directed by the trial court. I set aside the consecutive sentences and substitute the same with concurrent sentences. The appellants shall therefore serve five years imprisonment, which is the higher of the three sentences, in the event that they do not raise the compensation and the fines imposed.

86. I also note that the 1st appellant admitted having been previously convicted of forgery. She is therefore not a first offender in a related case.

87. As the 1st appellant was on bond pending appeal, her bond is now cancelled and any cash bail paid shall be released to the depositor upon production of the original receipt issued by the court. The committal warrants shall be amended to reflect the revised prison term sentences imposed which is concurrent and not consecutive, with five years being the maximum.

88. I so order.

89. This file is closed.

Dated, Signed and Delivered at Kisumu this 30th day of May, 2024

R.E. ABURILI

JUDGE